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January 13, 1984

Mr. Charles E. Sirc, Secretary (D.A.)
State Board of Registration of Funeral
Directors and Embalmers
Hazen Drive
Concord, New Hampshire 03301

Dear Mr. Sirc:

By letter dated December 23, 1983, you asked whether the Board of Registration of Funeral Directors and Embalmers has the authority to withhold the administering of the practical exam for an embalmer's license or to revoke the apprentice license of an individual about whom the Board has received certain allegations concerning sexual misconduct.

The answer to your first question is that the Board may not deny the applicant a chance to take the examination on the basis of unsubstantiated allegations; it must first hold a hearing to determine the truth of the allegations if the allegations have not been proven. In response to your second question, the Board may revoke an apprentice license provided it holds a proper hearing and finds a basis for such revocation. The revocation may only take place after a hearing, however, unless the Board finds an imminent peril to public health, safety or welfare, and even in that case only for a period of ten working days before a hearing must be held. Both questions are discussed in more detail below.

There is no requirement that the Board wait until a criminal conviction is obtained before taking action in a case where criminal conduct has been alleged which, if substantiated, would form the basis for disciplinary action. If the Board is



to proceed on the basis of these allegations prior to a conviction, however, it must hold a hearing to obtain evidence concerning the allegations and make an independent determination of the truth of the allegations and the consequences, if any, on the individual's license or application or both.

Although it may generally be true that due process requirements are not violated by refusing to give a license applicant a hearing before denying his application where the statute does not call for a hearing,* 51 Am.Jur.2d Licenses and Permits 557, it is also true that a licensing authority is not justified in refusing a license because of an unsubstantiated accusation of crime or because of a moral appraisal that is not relevant to the conduct of the business for which the license is sought. 53 C.J.S. Licenses §38. When the decision to deny a license is based on a finding of fact, the same considerations should apply as in cases involving the revocation of licenses. Cooper, State Administrative Law (1965) at 149-150, citing Goldsmith v. U.S. Board of Tax Appeals, 270 U.S. 117 (1926).

In answer to your first question concerning withholding the administration of the exam, RSA 325:13 requires any person to meet certain qualifications before he may engage in embalming. One of those qualifications is that the person be "of good professional character." If the Board has substantiated information which shows that the applicant is not of good professional character or that he does not otherwise meet the qualifications of RSA 325:13, we see no need to administer the examination. If the information is merely an allegation, however, the Board has a duty to determine the truth of the allegations before denying the chance to take an examination. Therefore, in the case of unsubstantiated allegations, which is apparently all that the Board has received to date in the case in question, if the Board elects to proceed before a criminal conviction is obtained, a hearing should be held to determine the truth of the allegations before an examination or application is denied.

An apprentice license is issued pursuant to the provisions of RSA 325:30 and Rule Frl 301. RSA 541-A:15, II requires notice and a hearing before a license may be revoked, although the Board could order an immediate suspension of the license if

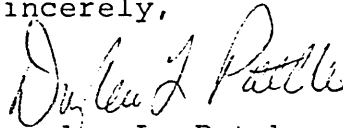
*See RSA 541-A:14, III(a), which states that any state agency may deny a license application "on the basis of nonadjudicative processes, if disposition of the application by the use of these processes is not precluded by any provision of law ...". There is no provision of law which requires a hearing before an embalmer's license application may be denied.

it found "that public health, safety, or welfare requires emergency action ..." and it commenced a hearing within ten working days of the suspension. RSA 541-A:15, III.

The answer to your second question is therefore that the Board may only revoke the apprentice license for a period of ten days before holding a hearing and it may only undertake such revocation if it is an emergency as defined above. Without a finding of an emergency, the Board would have to first hold a hearing on the person's apprentice license and hear evidence of the allegations, after which the Board would decide whether the evidence warranted a revocation. Findings of fact and conclusions of law would have to be incorporated in any decision of the Board. RSA 541-A:20. These same procedures would have to be followed in the case of an emergency suspension, though the hearing could be held after the suspension, but within ten working days.

I trust this has been responsive to your questions. Please let me know if you require anything further.

Sincerely,



Douglas L. Patch
Assistant Attorney General
Division of Legal Counsel

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